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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 491

LEONA PEAK,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITIONER'S BRIEF

MAY IT PLEASE THE COURT:

Opinions Below

Opinion of the District Court for the Eastern District of Tennessee, Southern Division, is reported in 138 Fed. Sup. 810 and Tr. 5-6.

Opinion of the Circuit Court of Appeals, Sixth Circuit, is reported in 229 Fed. (2d) 503 and Tr. 8-9.

Jurisdiction of This Court

The plaintiff filed her complaint in the United States District Court on February 19, 1954 (Tr. 1-4). On motion of the defendant, judgment was entered in the District Court dismissing her suit, on February 15, 1955 (Tr. 4

and 7). The opinion and judgment of the court below was affirmed by the Circuit Court of Appeals on February 14, 1956 (Tr. 7). A timely petition to rehear was filed on March 3, 1956, and was denied on March 12, 1956 (Tr. 9). A timely petition for certiorari was filed in this court on May 12, 1956, and was granted on October 8, 1956 (Tr. 10).

The jurisdiction of this court is invoked under Sections 445 and 817 of Title 38, United States Code Annotated, relating to suits on War Risk Insurance and National Service Life Insurance; and Title 28, United States Code Annotated, Section 1254 (1) (62 Stat. 928), giving this Court jurisdiction in certiorari cases.

Questions Presented

Oscar Charles Peake, Jr., son of the petitioner here, was serving in the United States Army and he was granted a $10,000.00 policy of National Service Life Insurance and made his mother, the petitioner here, the beneficiary, and he served in the Army until on or about July 30, 1943, when he disappeared, without intelligence or tidings concerning him since. He was 18 years of age, devoted to his parents and to his younger sister and other relatives. He visited his home as often as he could and communicated with them regularly. He did not have the training or ability to make a living alone or apart from his near relatives. His personal habits were good and he was not dissolute or lacking in recognition of moral responsibility in any way. At the time of his disappearance he was a member of Company "B", 10th Infantry Training Batallion, Camp Wheeler, Georgia, and his organization on said date, or shortly thereafter, was enroute to San Francisco. The United States Army, ever since his disappearance, has made every effort to locate him or to have intelligence or tidings of him. The Federal Bureau of Investigation has also sought to locate

him or to receive intelligence of him. The last communication from him to his family was on or about July 30, 1943. The assured was suffering from cholera, nervous trouble, mental trouble, St. Vitus Dance, general disability, and weakness and despondency. He could not have lived for any length of time without assistance from his family or other relatives. The complaint charges that he died on or about July 30, 1943. The complaint also alleges that the facts and circumstances of his disappearance and death were such that in the case of Oscar C. Peak v. American National Life Insurance Company, No. 32168, in the Chancery Court of Hamilton County, Tennessee, on February 7, 1953, it was Ordered, Adjudged and Decreed by the court that the deceased was 18 years of age when he entered the military service of the United States; that he regularly communicated with his father and mother; that he returned to his home in Chattanooga to visit his parents when he was granted a leave of absence from military service, after which he returned to his post at Camp Wheeler, Georgia, and that the last communication or letter received by his parents or members of the insured's family was on or about July 30, 1943; that he disappeared from the military unit with which he was serving, and that diligent search and inquiry was made by the parents of the assured and members of his family, but that said search and inquiry disclosed no information or intelligence to account for his disappearance; and that the Federal Bureau of Investigation made diligent search and inquiry for the missing assured, but that its search and inquiry failed to disclose any information showing a reason for assured's disappearance or indicating his whereabouts, and that it appeared to the court that the insured had been absent and had not been heard from by those who ordinarily would have heard from him, for a period of more than seven years, and the court pre-

sumes and finds that the insured is dead; and under all the facts and circumstances disclosed by the evidence, finds and decrees that said insured died on or about July 30, 1943, the date of his mysterious and unexplained disappearance (Tr. 1-4).

Question 1. What does Section 810 of Title 38, U.S.C.A. mean, and does this statute repeal the English Common Law?

Question 2. Could the assured, in frail health and unable to make a living without assistance from his family, disappear under such circumstances that the law would presume from his disappearance, and no tidings of or from him for seven years, that he died or on about the date of his disappearance on July 30, 1943?

Question 3. Does Section 810 of Title 38, U.S.C.A. mean that in all suits on National Service Life Insurance, where the soldier disappeared, and no tidings of or from him for seven years, regardless of the circumstances of his disappearance, the law could not presume that he died immediately on his disappearance, and that in all cases the presumption would have to take effect seven years after the disappearance?

Question 4. Was petitioner's claim against the United States barred by the statue of limitations of six years, as held by the Circuit Court of Appeals, or did the statute of limitations begin to run only at the end of seven years, when the presumption of death became effective, in accordance with the English Common Law?

Statement of the Case

This is an ordinary suit, brought on a National Service Life Insurance policy. It was brought well within six years after the expiration of seven years from the disappearance of the soldier, on July 30, 1943. It was charged that he died

on or about the date of his disappearance, July 30, 1943. The District Court held that under no circumstances could Section 810 of Title 38, U.S.C.A., be construed to permit proof of death at or about the time of his disappearance, and that the policy had lapsed. The United States Circuit Court of Appeals construed the statute to mean that death could have resulted at an earlier date, provided, however, there was some showing that the deceased had encountered some specific peril or come within the range of some impending or imminent danger; and also held that plaintiff's claim was barred by the statute of limitations, and, as we understand, because suit was not brought within six years from the date of his disappearance on July 30, 1943.

Brief and Argument in Support of Appellant's Appeal

Section 810 of Title 38, U.S.C.A., reads as follows:

> "No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Administrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may, for the purposes of this subchapter, be considered as sufficiently proved."

This statute has not been construed, insofar as we have been able to find, except by the Trial Court and the Court of Appeals in this case, and by the Circuit Court of Appeals, 4th Circuit, in the recent case of *United States* v. *Willhite*, 219 Fed. (2d) 343. The Circuit Court of Appeals, 6th Circuit, in effect held that there could not be any finding by the jury that death occurred on or about the time the soldier

disappeared, unless it appeared that the deceased had encountered some specific peril or come within the range of some impending or imminent danger, which might reasonably be expected to destroy life, citing *Davie* v. *Briggs*, 97 U. S. 628, or the time may be shortened by proof of facts and circumstances connected with disappearance as would show death at an earlier date, citing *Fidelity Mutual Life Assurance Ass'n.* v. *Mettler*, 185 U. S. 308. This holding is in conflict and disagreement with the holding of the 4th Circuit, in *United States* v. *Willhite, supra*, where the facts were almost identical with those in the case at Bar, except that the deceased was not in bad health, only nervous. This latter holding was to the effect that the National Service Life Insurance Act section providing presumption of insured's death following seven years' continued and unexplained absence, does not preclude introduction of evidence in actions on claims where there is no direct proof as to insured's death, to rebut presumption and show true date of death to be earlier than the expiration of such period. The holding of the Circuit Court of Appeals in the case at Bar is also in conflict with the holding of the Circuit Court of Appeals, 5th Circuit, on the same subject matter, in the cases of *United States* v. *Hayman*, 62 Fed. (2d) 118, and *Mutual Life Ins. Co. of New York* v. *Hamilton*, 143 Fed. (2d) 726. In neither of these cases was there any showing that the assured had encountered some specific peril or come within the range of some impending or imminent danger which might reasonably be expected to destroy life. In *United States* v. *Hayman*, the facts were almost identical with those in the case at Bar. The case had been submitted to the jury and the jury found that the deceased had died on October 12, 1918, the date of his disappearance, and it was contended, as in *Davie* v. *Briggs, supra*, that proof was required of some specific peril; but Judge Hutcheson, now

the senior United States Circuit Court Judge, in writing the opinion of the court, said:

> "The Supreme Court of the United States has itself declined to accept as exclusive the rule of Davie v. Briggs, that proof must be made that at the time of the disappearance the person was subject to peril or danger. Fidelity Mutual Life Ins. Co. v. Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; cf. Wigmore Evid., Sec. 2531. In that case it was declared that the inference of death might arise from a disappearance inconsistent with the continuance of life, even though exposure to particular peril is not shown."

The court affirmed the judgment for the plaintiff on this War Risk Insurance policy.

In *Mutual Life Ins. Co. of New York* v. *Hamilton, supra,* the insured and deceased, Hamilton, was not subject to any peril or danger, and the case was submitted to the jury, and the jury found in favor of the plaintiff on the policies, that the deceased had died, but that death occurred while the policies were in force and effect, and not at the end of the seven year period after his disappearance. Judge Hutcheson was one of the Circuit judges considering that case. Near the end of the opinion of the court, affirming the judgment below in favor of the plaintiff, the court said:

> "The numerous questions propounded in this opinion, meanwhile probing the facts, add up to the conclusion that this case is pre-eminently one for the jury."

The Court further said:

> "Without doubt there is ample evidence to support the jury's finding that the presumption of death had been established. This having been done, it was neces-

sary in the present case that the time of death be fixed by the jury at some time within the seven-year period. The fact of death as established may be considered by the jury in fixing the time of death. 25 C.J.S., Death, Sec. 10, p. 1069. In addition to the letters, statements, and the other circumstances mentioned above from which an inference of Hamilton's death at or about the time of his disappearance may be drawn, the jury was entitled to take into consideration the fact that for many months he had been in such failing health as to be unable to work and earn a livelihood, that he had no funds of consequence on which to live, and there is no showing that the charity of his friends or the forbearance of his creditors was such that one in his state of health could long subsist, which fact would render it not improbable that had he remained alive he would have, as had been his custom for some time theretofore, called upon his family, especially his old mother, who had never failed him for support."

In *United States* v. *Willhite, supra,* George Skinner, the deceased, had, on March 13, 1944, applied for a National Service Life Insurance policy for $10,000.00, and designated his wife, Edna Mae Skinner (now Willhite) the appellee, as principal beneficiary, and the policy was duly issued, effective March 1, 1944, and, like Oscar Charles Peak, Jr., on March 24, 1944, his army unit was assigned to embark for an overseas destination, and the deceased, George Skinner, had been officially listed as absent without leave on the morning report. He was not subject to any peril or danger. He visited his family in North Carolina and was last seen by them on March 20, 1944, when he left his home on the morning of that day—presumably to return to Camp Patrick Henry, Virginia, but there was no evidence that he reported back to his army unit, and his family never heard

from him again. He had not said that he expected to commit suicide, but did say—not to his wife, but to his father and mother—that he would die before he would go overseas.

In *Davie* v. *Briggs*, Allen Jones Davie had left the State of North Carolina in 1851 to go overland to California, and was never heard from again after reaching the hostile Indian territory, and it was contended by complainants that he had died at the end of the seven-year period; but Mr. Justice Harlan, quoting from the Court of King's Bench in *Doe dem. Knight* v. *Napean* (5 Barn and Adol. 86), said:

> "Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead—there is none as to the time of his death."

Thereupon the Court said:

> "We therefore follow the established law when we inquire whether, according to the evidence, Allen Jones Davie died at an earlier date than at the end or expiration of the seven years, when the legal presumption of death arose. It seems to us that, upon the showing made by the complainants themselves, the conclusion is inevitable that he died some time during the year 1851."

This court, in *Fidelity Mutual Life Assur. Ass'n.* v. *Mettler, supra,* referring to *Davie* v. *Briggs, supra,* speaking through Mr. Chief Justice Fuller, said:

> "But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuation of life, even though exposure to some particular peril was not shown, and the evidence indicated that Hunter came within the range of immediate danger."

In the above case the deceased disappeared December 4, 1896, and suit was brought on December 2, 1897, and the case was decided by the United States Supreme Court on May 5, 1902, and the question of presumption of death at the end of seven years was not involved, but the court found that his death was proved as of December 4, 1896.

This is an important question of Federal law, which has not been, but should be finally settled by this court, and, we believe, in accordance with the holdings of the 4th and 5th Circuits.

The effect of the holding of the Circuit Court of Appeals, Sixth Circuit, in the case at Bar, is that petitioner's suit is barred by the statute of limitations and is in conflict, on the same subject matter, with the holdings of the Circuit Court of Appeals, Fifth Circuit, in *United States* v. *Hayman*, 62 Fed. (2d) 118, and in *Mutual Life Ins. Co. of New York* v. *Hamilton*, 143 Fed. (2d) 726, and with the Fourth Circuit Court of Appeals in the case of *United States* v. *Willhite*, 219 Fed. (2d) 343, both Circuits holding, in effect, that the statute of limitations does not being to run until the end of the seven-year period of disappearance, and that the court had jurisdiction to try the cause, and it was a matter for the jury to decide as to the time that death occurred, and not a question for the court to decide as a matter of law, as did the Sixth Circuit in the case at Bar.

We think the question of the statute of limitations is controlled by the three cases cited above.

Another case to the same effect is *Howard* v. *United States*, 28 Fed. Supp. 985. This case quotes at length from *United States* v. *Hayman*, *supra*, and from other cases cited, and then the court says:

> "The Government asserts that to apply this principle here would be to change the condition which the

sovereign has imposed upon the right to be sued—namely, the institution of the suit within six years.

"Death, if it actually occurs, causes the right of action to accrue. But, where reliance is placed not upon acual death, but upon the presumption arising from unexplained absence for a period of seven years, the right to sue does not come into being until after the expiration of the period.

"Only after the period has run fully, can *the fact of death be proved.*

"In using the presumption to suspend the running of the statute, we are not extending the period during which the consent of the sovereign is effective. Absent direct proof of *the fact of death*, which inaugurates the limitation period, the *presumption* which the seven-year period supplies as proof of the fact is used instead. So that all we do is to give effect to a presumption without which there *could be no* proof of death.

"As the Government's duty to pay stems from the fact of death, the Government is not harmed when absent direct proof of that fact, the legal presumption from absence is used as an aid or a substitute. For, if suit were instituted before the expiration of the seven-year period, and the assured, like Enoch Arden, later returned, the Government might be confronted by conflicting claims or find that it had paid in full a policy upon the life of a person who is still living and who would, ordinarily, still be obligated to the continued payment of the premiums.

"If the beneficiary waits the full seven years, he or she is playing fair with the Government. For, by resorting to the aid of the presumption in proof of death, any future claim that death, *as a fact*, actually *did not* exist in the case is forestalled.

"A policy of liberalism permeates the entire structure of war risk insurance."

In *New York Life Ins. Co.* v. *Nashville Trust Co.*, 159 S. W. (2d) 81, the contention was made by the defendant that the statute of limitations had run. The Tennessee Supreme Court quoted from Corpus Juris, as follows:

> "Although there is authority to a different effect, the great weight of authority supports the view that where the fact of death can only be determined through the aid of the statutory presumption of death from seven years' unexplained absence, the beneficiary's cause of action does not accrue until the expiration of the seven-year period following the disappearance of the insured, and the statute of limitation does not begin to run until that time."

The Tennessee Supreme Court went on to say:

> "Numerous decisions supporting the text just quoted are cited thereunder and see also Notes, 34 A.L.R. 91; 61 A.L.R. 686; 119 A.L.R. 1308; L.R.A. 19188, 95."

The question of the statute of limitations is an important question of Federal law, which has not, but should be settled by this Court, and, we believe, in accordance with the foregoing cases.

We also respectfully insist that the District Court has so far departed from the usual course of judicial decision on the question of the statute of limitations, and against the Fourth and Fifth Circuit, and this departure has been sanctioned by the Circuit Court of Appeals in the case at Bar, and that this calls for an exercise of this Court's power of supervision, and that this Court should, and will, hold that the conclusions of the Fourth and Fifth Circuits, above

sought, are humane and in accordance with the purpose of the Congress in passing the National Service Life Insurance Act.

Section 810 of Title 38, U.S.C.A., has not been, but should be construed by this Court. The first sentence:

> "No state law providing for presumption of death shall be applicable to claims for National Service Life Insurance,"

clearly shows, we think, that the intent of Congress was to make a uniform system for National Service Life Insurance. The next sentence clearly does not attempt to repeal the English Common Law, as it has been adopted by our American Courts, including this Court, but merely gives the Administrator of Veterans Affairs permission to find and hold that the unexplained absence of any individual from his home and family for a period of seven years, during which time no evidence of his existence has been received, presumes death at the end of that period.

We think the case of Oscar Charles Peak, Jr. *v.* United States; *United States* v. *Hayman, supra,* and *United States* v. *Willhite, supra,* are so identical in their facts that it becomes a part of the National welfare for this Court to carefully supervise the lower Federal courts in administering the National Service Life Insurance Act, so there will not be any discrimination as to the treatment of the beneficiaries of soldiers of the United States, and that this Court should, and will, consider the case at Bar and reverse the Circuit Court of Appeals, Sixth Circuit, and order that court to remand the cause to the District Court for trial.

Conclusion

WHEREFORE, for the reasons set forth above, it is respectfully submitted that this Court should reverse the opinion and judgment of the Circuit Court of Appeals and

order that Court to reverse the District Court, and remand the cause to the District Court, with directions to reinstate the cause upon the docket and let the defendant answer, and the cause tried to a jury, upon the merits, as sought in the original complaint.

Respectfully submitted,

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